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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF	)	
TELEPHONE COMPANY-CABLE	)	
TELEVISION CROSS-OWNERSHIP RULES,	)	CC DOCKET NO. 87-266
SECTIONS 63.54-63.58	)	
	)	
AND	)	
	)	
AMENDMENTS OF PARTS 32, 36, 61, 64,	)	
AND 69 OF THE COMMISSION'S RULES	)	RM-8221
TO ESTABLISH AND IMPLEMENT	)	
REGULATORY PROCEDURES FOR VIDEO	)	
DIALTONE SERVICE	)	

SOUTHWESTERN BELL CORPORATION'S INITIAL COMMENTS ON MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

JAMES D. ELLIS
PAULA J. FULKS

175 E. HOUSTON
ROOM 1212
SAN ANTONIO, TX 78217
(210) 351-3424

ATTORNEYS FOR
SOUTHWESTERN BELL
CORPORATION

DECEMBER 16, 1994

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SUMMARY

Southwestern Bell Corporation ("SBC") contends that the *FNPRMIII*[1] perpetuates many of the misconceptions of the *Memorandum Opinion*, especially insofar as the *Memorandum Opinion* squarely rejected the "anchor tenant" innovation. Moreover, the Commission's apparent readiness to mandate a single technology to preserve the illusion of competition among video information providers, instead of competition with cable companies, is a disappointing retreat from earlier promises that the FCC would not mandate technology choices but allow the market to work its dependable magic.

Precisely because the industry is changing so rapidly, the Commission should be reluctant to mandate any technology, especially one as expensive and cumbersome as the "virtual digital" solution proposed by GTE in an early Section 214 application for a video dialtone ("VDT") trial. If the FCC truly wishes to satisfy consumer wishes, it will allow local exchange carriers ("LECs") to experiment with these and other innovations but will decline to mandate any of them. Similarly, the Commission should not require channel sharing, but rather permit LECs to create such arrangements in as many different incarnations as there are strategic planners. Specific flexibility which the FCC should expressly permit include no interdiction of analog capacity, mandatory joint marketing, LEC administration of the shared channel arrangements, and long-term contracts between LEC and programmer-customers. The Commission should not permit cable companies to lease

[1]*Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (hereinafter *"Memorandum Opinion"* or *"FNPRMIII,"* as appropriate), *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, released November 7, 1994.

capacity on VDT networks because this would permit the cable companies to finance their network expansion at the LEC's expense.

SBC supports the Commission's recommendation to permit LECs to acquire (or jointly construct) cable facilities where population density is inadequate to support two wire-based video services. SBC urges the FCC, however, to expand this rule to allow acquisition and/or purchase of such facilities wherever it is economical to do so.

SBC vigorously opposes the FCC's proposal to impose any form of preferential access upon VDT on the grounds that it is unconstitutional and a violation of the Communications Act of 1934.

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and	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

SOUTHWESTERN BELL CORPORATION'S INITIAL COMMENTS ON MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Comes now Southwestern Bell Corporation ("SBC") and on behalf of its operating subsidiaries files these initial comments in response to the Federal Communications Commission's *Third Further Notice of Proposed Rulemaking* herein.[1]

I. INTRODUCTION

After a two-year wait for the Federal Communications Commission ("FCC") to reconsider its video dialtone ("VDT") framework, SBC was disappointed that so few changes were made. Despite the imposing appearance of the 142-page *Memorandum Opinion*, the Commission retained the essential contours of its earlier decisions, leaving little hope for the telephone industry that it will ever be able to compete successfully with the entrenched cable companies in the video market. Worse still, the FCC abandoned its own

[1]*Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (hereinafter *"Memorandum Opinion"* or *"FNPRMIII,"* as appropriate), *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, released November 7, 1994.

initial goal of "creating opportunities to develop an advanced telecommunications infrastructure, increasing competition in the video marketplace, and enhancing the diversity of video services to the American public." [2] Instead, the *Memorandum Opinion* continues the earlier arbitrary requirements on VDT networks of unlimited capacity availability and scrupulously nondiscriminatory access. While ostensibly designed to encourage diversity in these networks, these requirements actually will repress competitive video services by making VDT so unprofitable that local exchange companies may abandon it. For these and other reasons, SBC intends to seek review (appellate or administrative) of the *Memorandum Opinion*. Understanding the genesis of this disappointment, however, is a key to Commission evaluation of these *Initial Comments,* for decisions on the issues raised in the *FNPRMIII* may determine whether VDT will be viable for SBC's subsidiaries and, we suspect, the other local exchange companies.

SBC therefore urges the Commission to make the following determinations of the issues raised in the *FNPRMIII*:

1. Do not mandate the digital encoding proposal by GTE;

2. Do not mandate channel sharing (but if it is mandated, impose only the most minimal constraints on the local exchange company's ("LEC's") participation in its management and design);

3. Permit LECs to purchase cable facilities or to construct facilities jointly with cable companies under the most liberal criteria; and

4. Reject any "preferential access" rules.

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[2] *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking ("Second Report"), In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58,* released August 14, 1992, ¶ 1.

II. THE FCC SHOULD NOT MANDATE THE DIGITAL ENCODING PROPOSAL OF GTE

The Commission seeks comment on a proposal by GTE in its Section 214 application [3] for making digital and analog channels on a VDT system transparent to both the programmer-customer and the end user. If a programmer-customer delivers an analog video signal to the VDT network, GTE proposes either to modulate this signal onto an analog channel or to encode and multiplex this signal input onto a digital bit stream. [4] The FCC posits that this arrangement might meet the Commission's "capacity and expandability goals" [5] despite the admitted "technical limits on the expandability of analog capacity...."

SBC strongly recommends that the Commission decline to mandate the GTE plan because it is not likely to provide a viable customer alternative to cable video service today and, therefore, cannot achieve the Commission's key goal in this proceeding. Contrary to the FCC's suggestion,[6] set-top converter boxes which can accommodate digital transmissions cost approximately $700 each. Moreover, most customers will need more than one converter because they own more than one television set. The average American household contains 3+ televisions. Even if the programmer-customer absorbs the cost of the

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[3]*FNPRMIII* at ¶ 269; GTE Section 214 Application, File No. W-P-C-6955 at 6 (May 23, 1994).

[4]*Id.*

[5]*FNPRMIII* at ¶ 270.

[6]The Commission cites SBC's *Ex parte* letter of June 1, 1994 to support the $300 figure. The model presented by SBC used the most optimistic financials available and therefore projected set-top prices expected by the year 2000. Current prices are $700-$800. SBC apologizes for any confusion this may have caused.

box, the margins for profitability in VDT are so narrow that this added expense would discourage any profit-minded programmer from the market. [7]

The added costs of the GTE proposal, however, would not end with the set-top converters. SBC estimates the cost of modulating the analog channels to digital transmission at about $80,000 per channel. When combined with the cost of the converters, implementing the GTE plan does not make economic sense today. As those costs come down, SBC certainly believes this may be an option for VDT. Therefore, SBC requests that the FCC not mandate any channel provisioning arrangement, but rather let the market and business plans of the various RBOCs dictate the most appropriate method.

The Commission also seeks comment on the commercial availability of digital compression and transmission equipment. Currently the market has not settled on the standards and, therefore, predicting when the necessary digital facilities will be available is difficult. The Commission might inquire of set-top vendors the breakdown of their sales into analog versus digital equipment, as a way of gauging the pace of adoption. To reiterate, SBC suggests that the Commission allow the LEC maximum flexibility in choosing the appropriate method.[8]

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[7]SBC *Ex parte* letter, June 1, 1994.

[8]"It is not our intent, nor our proper role, to specify the technology, network architecture or functions that a telephone company would offer under video dialtone.... [O]ur policy...relies upon the technical and market creativity of those in the private sector responding to market demand and economics to determine the substance of telephone company video dialtone offerings." *Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking*, released August 14, 1992, ¶ 13.

III. THE COMMISSION SHOULD NOT MANDATE NUMEROUS VARIATIONS OF CHANNEL SHARING ARRANGEMENTS

A. Channel Sharing Is Not Attractive Nor Will It Accomplish The FCC's Goal Of Creating Competition For Cable Companies.

SBC is not enamored of any channel sharing arrangement. The extensive market research performed by the Company indicates that only one "full service" programmer-customer will be able to survive the intense competition that all will face from the cable industry. Like telephony, video services delivery is capital-intensive. Therefore, capture of a "hurdle" market share is imperative to success and viability. Given the entrenched position of the cable provider, and adding the advent of conventional satellite, direct broadcast satellite services and wireless cable operations, the remaining market share available for the VDT programmer-customer is thin indeed. Virtually all of it must be achieved for a single system to be financially viable. Because channel sharing enables multiple programmer-customers to offer duplicative, "full service" palettes to consumers, however, that market share inevitably will be diluted, making the programmer's margins even thinner. It is for this reason that SBC urged the FCC in *ex parte* contacts to adopt (or at least authorize) an "anchor programmer" model.[9]

Nonetheless, the channel sharing innovation clearly offers a solution to the inherent limitations on expanding analog capacity, if such expansion is necessary in a given market. This innovation could obviate the duplication of programming on the scarcer analog channels while permitting multiple providers to market the programming. Like other

[9]Notwithstanding SBC's objections to channel sharing, however, we do not object to Commission authorization of channel sharing arrangements. It is a Commission mandate which concerns SBC.

permutations of VDT, however, it is imperative that the resulting arrangement permit the programmer-customer(s) to offer the same (or more) services as the cable company with the same ease of access and similar prices, or effective competition simply will not emerge. Accordingly, any channel sharing arrangement which requires interdiction of analog channel capacity not presubscribed is not viable. SBC estimates the cost of interdiction at $100-200 per home passed. Such additional costs in a business already laden with start-up costs would likely discourage any development.

One solution to this problem would be to allow multiple video information providers ("VIPs") to offer the analog capacity to consumers under a joint marketing agreement among these VIPs. (This does not mean resale.) Such an agreement for complementary, not competing, services would obviate the need for interdiction. It also would permit each VIP to market enough analog capacity to be competitive with cable television companies, wireless cable providers, and direct broadcast satellite services. This option would be facilitated by one VIP receiving a large number of (but not significantly all) analog channels. That entity would facilitate joint marketing arrangements with other VIPs.[10] Even so, the channel sharing arrangement is much less attractive to providers and consumers alike than an anchor tenant structure.

[10]This model can be extended to the digital channels as well. The program diversity which would result from such joint marketing of a single package would create a more competitive offering.

B. The LECs--Or A Programmer-Customer Selected By The LEC--Should Structure And Administer Shared Channels.

The Commission seeks guidance on how the details of shared channel capacity should be structured and administered. Clearly, a third party should **NOT** be imported for this purpose. The already thin margins of VDT services--both transport and content--make the additional thirst for "margins" that another party would bring unquenchable. On the other hand, advantages emerge whether the LEC or one programmer-customer--selected by the LEC--administers the program. Assuming that the FCC permits a condition of the offer of shared analog capacity upon a joint marketing agreement, the administrative details could be handled in the same agreement, which should minimize costs and inconsistencies. Handing responsibility to more than one programmer-customer, however, would be much too difficult and unnecessary. One could justify LEC administration of the program on the ground that the LEC is responsible for provisioning the "drop" portion of the platform, and the shared channels are an inevitable result of that provisioning.

SBC agrees that permitting LEC administration of channel sharing arrangements would require modification of the Commission's cross-ownership rules. Similarly, allowing the LEC's affiliate to be the administrator of the plan would require modification. Either change may be undertaken, however, without negation of the statutory ban on which the FCC's cable/telco cross-ownership rules is based (47 C.F.R. § 533 (b)(1) (1984)). The statute merely prohibits the "direct provision" of video programming to subscribers by common carriers to subscribers in their telephone service areas. Administration of a channel sharing arrangement, whether by the LEC or an affiliated programmer-customer, in itself would not constitute "direct provision" of programming. This limited involvement certainly is more tangential than the now-permitted outright ownership of programming (*see Memorandum Opinion* at ¶ 64).

SBC supports modification of the Commission's rule "prohibiting video programmers from jointly operating, with a LEC, a basic VDT platform" (*FNPRMIII* at ¶ 275), regardless of whether the FCC permits channel sharing. However, SBC does not view the involvement of a programmer [11] in a channel sharing arrangement as "joint operation" with the LEC of a VDT platform. Rather, the programmer would be purchasing wholesale products (i.e., analog capacity) from the LEC to package with its own products (i.e., content) for delivery to the programmer's own customers, the subscribers. The relationship between the LEC and the programmer-administrator could be completely arms-length and still accomplish the goal. As for the joint marketing requirement, it would be no different from any other term or condition attached to the purchase of a service which ensures that the purchaser is financially capable of paying for the service. Of course, if the LEC administers the channel sharing arrangement, the current rule against joint operation of a VDT platform would require amendment, as it will when the Commission harmonizes all of its current VDT rules to the trend of judicial decisions that the telco/cable cross-ownership restriction is unconstitutional.[12]

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[11]Whether the programmer is affiliated with the LEC or not.

[12]This harmonization must assume top importance at the Commission in the near term. Five district courts and one federal court of appeals have uniformly ruled that the ban violates the LECs' right of free speech. Not a single court considering the issue has disagreed. Clearly, the Commission's nearly identical (but even more restrictive) rules suffer from the same infirmity. *See SBC's Petition for Reconsideration*. Until the FCC corrects

C. The LEC Should Structure The Process To Select A Channel Administrator In Accordance With Its Own Business Needs.

The Commission seeks the parties' views on criteria which should be used to select the shared channel administrator. The LEC should decide these matters, since the LEC will be dependent on the success of the programmer-customers to assure payment of the significant capital expenditures required to build the VDT platform. Additionally, the LEC must be comfortable that the administrator will serve VIPs, as well as, the LEC. One method would be to permit a bidding or request for proposal ("RFP") process of the LEC's design, in which the candidates would produce evidence of qualifications, financial viability and experience in the industry and a proposed business plan. The bid or RFP could be timed to coincide with the required network disclosure. In the RFP or bid procedures, the LEC could specify and obtain administrator consent to the legal obligations of channel administration, including management of a joint marketing arrangement. The process could utilize least cost, conformance to specifications and experience in the industry as selection criteria.

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this error, it risks being found in contempt of the several injunctions forbidding it from enforcing the statute against prevailing companies. The inequity of the rule restraining some but not all LECs, however, should be obvious. SBC urges the FCC to eliminate the rule, immediately. No additional action should be necessary. If the Commission believes that consumer protection, in addition to the stringent nonstructural safeguards of *Computer Inquiry III* are necessary, it first must demonstrate why video service delivery differs from other enhanced services so as to require such onerous procedures. None of this showing, however, can be used to prevent those companies prevailing in their constitutional challenge to the law from constructing and operating VDT networks on which their affiliates offer services or from building cable-only networks and acting as a cable operator in the interim.

D. Programming Selection For Shared Channels Should Be Structured So As To Maximize Competitive Position Vis-A-Vis CATV And Direct Broadcast Satellite ("DBS").

The Commission notes that each company filing a Section 214 application for approval of a VDT network with shared channel capacity has structured the programming selection process differently. Each proposal has its own merits. The plethora of choices demonstrates, in SBC's view, that the FCC should not interfere in this experimentation. Rather, as with other aspects of VDT deployment, the Commission should permit the LEC to fashion a structure which will be most responsive to the market in which it finds itself. SBC's consumer research has found that the competitive viability of noncable video services is tenuous without restrictions on programming choice. Any restrictions could tip the balance in favor of the cable incumbent. Therefore, whoever the LEC selects to administer the shared channel capacity should select the programming to be carried on it. Cost considerations will weigh heavily in the balance, as will the need to mimic the basic cable offering so as to remain competitive. Demographics which can be uncovered only through detailed market research will be necessary. The focus should be on consumer demand and not on programmer preferences.

E. Other Terms And Conditions Should Be Left To The Negotiations Between Carrier And Programmer. Long-Term Contracts Should Be Explicitly Permitted. Cable Operators Should Not Be Permitted To Lease Capacity On The VDT Network.

For the most part, the Commission should leave to individual negotiations the terms and conditions of VDT offerings. Some parameters, however, should be explicitly permitted by Commission order. Long-term contracts, for instance, are essential for both the LEC and the programmer-customer to acquire the significant capital outlays required to initiate service. Commitments by both parties to long-term arrangements should provide the security for customers to make a competitive choice without jeopardy of losing service.

On the other hand, it would serve no legitimate public interest to permit cable companies to lease VDT capacity. The Commission's express purpose in creating VDT was to produce a competitive alternative to cable services. If the same facilities are used to deliver both offerings, the public will see little enhancement to its choices. Worse yet, the cable companies could use VDT channel capacity to offer near video on demand and video on demand, making their "cable" offerings more attractive to consumers, while using their own capital dollars to build out networks capable of carrying both video and telephony. In a very real sense, the LEC could be seen as "funding" the cable company's build-out in this scenario. Forbidding cable companies from subscribing to VDT service would avoid this problem and force the cable companies to create competitive networks.

Most importantly, however, the FCC should permit joint marketing of shared analog channel capacity by the programmer-customers, and it should permit the LEC to condition its offer of this capacity on such an agreement being negotiated. If the VIPs on a VDT system do not joint market the analog service, none of them will be able to acquire enough channels to compete against CATV or DBS. Analog channel allocation without joint marketing will also drive costs higher for consumers because of the need (discussed *supra*) for interdiction equipment. Therefore, the FCC should permit LECs to require all VIPs which use that LEC's VDT analog capacity to market their services collectively.

IV. THE FCC SHOULD PERMIT TELCOS TO ACQUIRE CABLE FACILITIES

The FCC seeks comment on the appropriate modifications to their prohibition that would permit acquisitions of cable facilities in markets in which two-wire multichannel video delivery systems are not viable, while preserving the ban in other markets. The Commission's intentions here are laudable, but the proposed action does not go far enough. SBC urges the Commission to permit market forces to determine when and where cable systems are better run by telephone companies than by their current owners. If the market will support prices which recover the cost of constructing and maintaining multiple networks, two facilities-based providers will emerge. If not, the Commission (and the Congress) is thwarting both market forces and consumer demand by forcing duplicative investment. The Commission could achieve its objective by repealing the cross-ownership rules completely.

Failing that bold move, the FCC is prudent in seeing a place for a "single wire" option. The criteria established should not be so restrictive that cable companies will not seek LECs as possible purchasers. Additionally, the criteria should be straight-forward and easy to interpret, so that parties may negotiate in private without requiring prior FCC adjudication of unclear items. Therefore, SBC suggests that the FCC choose a population size cap for determining the areas in which LEC acquisition of cable facilities would be permissible. Any area under 100,000 homes should be seriously considered.

The Commission also seeks comment on the proposal to permit joint construction of VDT systems in areas in which the acquisition ban is lifted. SBC supports the Commission's intention here. The current incarnation of VDT is so fragile financially that many markets may not see any VDT development. If the companies could construct a facility capable of video and telephony, and perhaps electrical services as well, the opportunities might be real and exciting. Realistically, however, not many such partnerships are likely to occur if the video offering must be a common carrier service for multiple programmers, as the current VDT framework would provide. Few cable companies would seriously consider constructing a facility which it must offer to competitors when they may avoid that obligation by building the facility themselves. If VDT were not a common carrier service, the situation would be vastly different. For purposes of proposing a rule for those few cases in which collaboration might be appropriate, however, SBC suggests that it would require a fairly large number of homes passed-at least 100,000--to justify providing telephony over a mixed-use facility. In smaller developments, the potential revenue stream is not likely to offset the large video-specific start-up costs which are not volume sensitive (*e.g.*, video servers).

V. THE FCC SHOULD NOT IMPORT UNCONSTITUTIONAL NOTIONS OF "MUST CARRY" CABLE REGULATIONS INTO VDT

A. A Grant Of "Preferential Access" To Commercial Broadcasters, Public Education and Government ("PEG") Or Not-For-Profit Video Programmers Would Violate The VDT Network Owner's Night Of Free Speech In Contravention Of The First Amendment Of The Constitution Of The United States.

Without citing any evidence on which it might rely for such a requirement, the Commission seeks comment on whether it legally can and should mandate preferential access to VDT services for commercial broadcasters or for certain classes of PEG or not-for-profit video programmers. One cannot answer the first question without knowing the answer to the latter, for the constitutionality of any "must carry" regulations will rest on the compelling nature of the need they are designed to fulfill and the narrowness of the remedy in ameliorating that need.

SBC submits that the FCC cannot meet the test handed down in *Turner Broadcasting System v. FCC ("Turner")*, 114 S.Ct. 2445, 1994 U.S. LEXIS 4831 (1994). While the final chapter of the "must carry" debate has not been written, several findings of this decision make success of an administratively-crafted companion for VDT extremely unlikely. Most importantly, the activities of both programmer-customers and the LECs in operating the VDT networks are "speech" protected by the First Amendment to the Constitution of the United States of America. Indeed, the Court referred to this as a premise on which "[t]here can be no disagreement... "*Turner* at Lexis p. 26. The Court also found that the cable "must carry" rules interfere in the exercise of that right in two ways: They reduce the number of channels over which the network owners exercise unfettered control, and they render it more difficult for programmers to compete for carriage on the limited channels remaining. The same reasoning would apply to "must carry" rules for VDT networks. Nor does this rationale change because one might conclude that "free" speech would not occur on VDT networks but for the "must carry" rules. Rather, the Court's warning is apropos:

> ...[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.

Turner at Lexis p. 32. Because the provision would "single[ ] out the press, or certain elements thereof, for special treatment" (*id.* at p. 33), it is subject to a heightened level of scrutiny.

In *Turner,* the Court held that the proper level of scrutiny was not the "compelling interest" test reserved for "viewpoint" laws but the lesser standard of "content-neutral" laws. If the FCC creates "must carry" rules for VDT, however, it may not be so fortunate. The Court's conclusion rested on two facts. First, the cable "must carry" provisions distinguish between speakers in the television programming market "...based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry... " (*id.* at Lexis p. 43). Second, the Congress's rationale for the cable "must carry" rules was "...to preserve access to free television programming for the 40 percent of Americans without cable" (*id.* at Lexis p. 45) and not because of any perceived preference for the messages over-the-air broadcast programmers disseminate. If the FCC fashions a rule, for example, which requires free carriage for not-for-profit programmers, that distinction would not be based "upon the manner in which speakers transmit their messages...." Further, if any part of the purpose for mandating preferential access indicates any preference for that speaker's speech (*e.g.* , educational speech might otherwise be lost, etc.), that would doom the rules to the strict scrutiny given content-based rules. Reversal would be likely.

As the disagreement among the justices in the majority illustrates, even if the rules are "content neutral," it is by no means easy to determine whether they will survive the intermediate scrutiny given such restrictions. To pass the test, three conditions must hold:

(1) the regulation must further an important governmental interest; (2) the interest must be unrelated to the suppression of free speech; and (3) the restriction must not be greater than that which is essential to furtherance of the governmental interest. In *Turner,* a plurality found that the record was insufficient to determine whether the test had been met for the cable "must carry" rules and remanded the case.

It is far from obvious that the interest in "free television" which apparently motivated Congress (and might form the basis for the FCC's adoption of such a rule for VDT) is so important a governmental interest as to warrant <u>any</u> restriction on free speech. Further, one might argue that the interest is directly related to the suppression of free speech, at least if the Commission maintains, as did Congress, that the broadcasters are an important portion of the debate of public affairs. Finally, the restriction is far from being the least intrusive possible. No record of inability to reach consumers has been made by the broadcasters. Only when VDT networks are the overwhelming choice of consumers, and only after a pattern of refusal to carry over the air broadcast stations has been demonstrated on the part of the VDT operators, could one conclude that any real threat exists. SBC's consumer research indicates that VDT in the near term will not capture enough market share to pose such a dire emergency. Moreover, the very fact that Congress has imposed "must carry" upon cable operators means that the broadcasters will have access to more than 60 percent of all homes, which makes it difficult indeed to imagine that VDT will signal their death knell. According to NCTA, approximately 93 million homes are passed by cable facilities, and more than 67 million subscribe to these services.

Even if the threat of VDT to broadcast revenues is serious, the problem may be eliminated or lessened by two less restrictive alternatives. First, the Commission has required all VDT networks to offer nondiscriminatory access. Thus, broadcasters are no less likely than any other programmer to obtain access from VDT network operators. Second, if finances are the problem, the FCC could request Congress to provide adequate funding to the not-for-profits so that they can purchase capacity on the VDT networks. Either solution would be far less offensive to the right of free speech than is "must carry," and therefore both are a threat to the constitutionality of the proposed regulation.

B. Mandated Preferential Access For PEG, Not-For-Profit Broadcasters And Commercial Broadcasters Would Violate The Statutory Requirement Of Just And Reasonable Terms And Conditions Of Service And The Prohibition Against Unjust And Unreasonable Discrimination.

Even if the "must carry rules" contemplated by the Commission would not be found unconstitutional, they violate the requirements of 47 U.S.C. §§ 201(b) and 202(a), for much the same reasons as those discussed above: The rule is not necessary; less restrictive alternatives are workable; and no serious harm to the public interest will occur if preferential access is not granted. In any event, the Commission should not ignore the continuing regulatory distortions it places on video services competition by such rules. With cable television and DBS services already in place, VDT operators and programmer-customers are not likely to reject any request for access which is supported to any degree by their market. On the other hand, if the services are not supported by customer demand, one must question the reasonableness of mandating their position on the network. This puts the Commission in an awkward position, for if the speech of these groups is valued for any aspect related to its content, unconstitutionality is probable. If the speech is not so valuable, however, the Commission will find it difficult to make the case that the preferential access is not "unreasonable" and not "unjust discrimination."

C. If Preferential Access Is Mandated, The Commission Should Permit The LEC To Determine Eligibility At Least To The Extent Of Choosing Which Of Several Eligible Programmers Should Be Carried.

The Commission seeks comment on various aspects of possible preferential access rules: Price to be charged, who should qualify, whether it should use a means test, etc. SBC takes no position on these matters, for it contends that the premise is fundamentally flawed and no such rules should be adopted. If the FCC imposes some kind of preferential access, however, it should fashion the rules so that identification of eligible parties is a simple matter. Where more parties are eligible than available capacity will serve, the LEC should be permitted to determine which programming will be carried. Given the thin margins on which a VDT network will work, it simply is not fair or reasonable to require the LEC to carry a programming mix which it believes is not suited to the market it serves.

LECs have no incentive to prevent facilities-based competition through control over pole attachment or conduit rights. Since the rates for pole attachments and conduit rights is regulated by the FCC (*see* 47 C.F.R. § 1.1401), adequate measures are available to assess whether a cable company is being treated fairly in this respect.

VI. CONCLUSION

SBC has long supported the FCC's determination to inject competition into the delivery of video services, including its courageous recommendation to Congress to repeal the telco-cable cross-ownership ban. We urge the Commission to continue that exciting path toward real consumer choice by making decisions associated with VDT which will preserve this alternative as a viable market entrant.

Respectfully submitted,

Southwestern Bell Corporation

By: ______________________
ROBERT M. LYNCH
PAULA J. FULKS

175 E. Houston
Room 1212
San Antonio, TX 78217
(210) 351-3424

ATTORNEYS FOR
SOUTHWESTERN BELL CORPORATION

December 16, 1994

CERTIFICATE OF SERVICE

I, Martha R. Kiely, hereby certify that copies of Southwestern Bell Corporation's Initial Comments on Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking have been served by first class United States mail, postage prepaid, on the parties listed on the attached.

Martha R. Kiely

Martha R. Kiely

December 16, 1994